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Attorney General Janet Reno
Federal ADR Council
C/O: Jeffrey Senger, Esquire
Deputy Senior Counsel for Dispute Resolution
U.S. Department of Justice
950 Pennsylvania Avenue, N.W. Room 4328
Washington DC 20530

Re: **Confidentiality in Federal Alternative Dispute Resolution Programs Guidance**

Dear Attorney General Reno:

The comments below are provided in response to the ADR Council's Guidance document entitled the "Confidentiality in Federal Alternative Dispute Resolution Programs" published in the Federal Register on October 4, 2000 (65 *Fed. Reg.* 59200).

Comments on the draft guidance document were required to be submitted by November 1, 2000. This relatively short comment period has prevented the submission of more detailed and substantive comments. However, the undersigned believe that the guidance document will have a significant if not determinative impact on the treatment to be given the confidentiality issue in agency alternative dispute resolution programs. Because the Council's guidance is likely to quickly become enshrined in individual agency ADR programs, it is essential that the Council indicate clearly the Government's policy regarding the use of confidential communications made in ADR proceedings for investigative and other purposes not contemplated at the time the parties agreed to engage in ADR.

In enacting Alternative Dispute Resolution Act of 1996 ("ADRA") Congress clearly intended to give parties in federally-related ADR proceedings an assurance that

their dispute resolution communications would generally be "immune from discovery." The ADRA defines the protections available to qualifying "confidential communications" in detail. The Act forbids neutrals from disclosing such communications, and also states that they shall not "be compelled to disclose" them. This Act requires prior notice to parties in any case where disclosure is sought for protected communications, an opportunity for the parties to contest disclosure before a federal court, and judicial balancing of the need for disclosure with the party's desires, and the need to preserve the confidentiality of DR communications.

It is unfortunate, therefore, that the guidance document does not articulate a Governmental policy in favor of the confidentiality of ADR communications. Nor does it articulate a policy of using ADR communications between private participants and Government neutrals only for their intended purpose, *i.e.* fostering resolution of the matter for which the ADR proceeding has been convened. As a result, the guidance, and the incorporated "Model Confidentiality Statement for Use by Neutrals", is likely to discourage rather than encourage participation in agency ADR programs. The omission of a statement in the guidance that agencies should not disclose confidential communications, absent adherence to the judicial override provisions of the Alternative Dispute Resolution Act of 1996 ("ADRA"), and should not use confidential communications for unintended purposes, is contrary to both the letter and the intent of the Act.

The ADRA contains both a clear definition of which communications made during an agency ADR procedure are "confidential" and a mechanism for overriding the ADRA's requirement that a communication made in confidence during an agency ADR proceeding remain confidential. The Council's guidance document refers to these provisions. However, the ADRA's judicial review requirements are inexplicably minimized in section VI and V of the guidance.

The Guidance should clearly state that the ADRA's procedures are applicable to all requests from other sources, whether inside or outside the Government. The commentary found at question 15 in Part IV of the Guidance refers to "a tension between [the ADRA and] statutory authorities [mandating federal employees to disclose knowledge of criminal violations or fraudulent activity]." In fact, this tension is adequately resolved by reference to the ADRA's provision for judicial review. ADRA permits disclosure whenever the party seeking such disclosure is able to make a compelling case for overriding the Act's clear preference for confidentiality. An inspector general's "official curiosity" is not an adequate grounds to obtain access to protected communications. *Breakey v. Inspector General of the United States Department of Agriculture*, 836 F. Supp. 422 (E.D. Mich. 1993).

Furthermore, the Model Confidentiality Statement for Use by Neutrals in Section V of the Guidance contains confusing references to the ADRA's definitions of "confidential communications" and the situations in which disclosure can occur. The Text contains a statement that "[e]ven though not required by the ADR Act, information about a violation of criminal law, or an act of fraud, waste, or abuse, or an imminent

threat of serious harm may have to be disclosed to appropriate authorities by a participant, but not necessarily by [the ADR neutral]."

This statement is likely to confuse rather than enlighten participants. The confusion arises from the juxtaposition of the above statement with the two preceding sentences. The entire text is as follows:

If you say something or provide documents to all the other parties it is not confidential. Under rare circumstances, a judge can order disclosure of confidential information. Even though not required by the ADR Act, information about a violation of criminal law, or an act of fraud, waste, or abuse, or an imminent threat of serious harm may have to be disclosed to appropriate authorities by a participant, but not necessarily by [the ADR neutral].

The text first states the ADRA definition of confidentiality and describes a situation in which a communication will not be accorded confidentiality. Second, it describes the judicial override mechanism available under ADRA. Having dealt with these two situations, the next statement appears to be describing yet a third possibility, involving agency investigative activities, in which a communication will not be accorded confidentiality. No such third possibility is authorized in the ADRA. Sections 574(a)(3) and (b)(4) which permit disclosure if another applicable statute requires the communication to be made public, do not authorize the use of confidential communications to pursue investigative or law enforcement objectives of the agency, which would rarely if ever require an initial public release of the communication.

The text states that in such a situation the neutral may not be required to disclose the confidential communication. The participant originating the communication is therefore left to wonder who else can disclose the communication, since by definition only the originator (and any co-participants) and the neutral were present when the communication was made.

If the intent is to describe a situation in which a confidential communication to the neutral has been repeated by the neutral to an agency participant, or otherwise shared with agency personnel participating in the ADR, and to inform the originator that the other party may then use the communication as the basis for a criminal investigation, the draft statement should state this explicitly. It must then also explain that such a disclosure may only occur after a court of competent jurisdiction has determined that the disclosure is required. 574(a)(4); 574(b)(5). By failing to do so, the guidance fails to adequately inform the private participant of its rights to protect a confidential communication, and fails to implement the judicial review provisions of the ADRA.

It also sanctions the disclosure of confidential communications by agency ADR participants to investigative and law enforcement personnel without observing the judicial review mechanism established in the ADRA to prevent inappropriate use of the ADR process. The ADRA does not authorize agencies to ignore the requirement for a judicial determination of necessity before utilizing an ADR communication to pursue other agency objectives.

The "Model Confidentiality Statement for Use by Neutrals" should be revised to accurately state the provisions of the ADRA regarding use of confidential communications outside of the ADR proceeding. The ADR Council should also explicitly state in its guidance document the Federal Government's policy regarding the use of ADR confidential communications for purposes other than pursuing resolution of disputes between private parties and the Government. Such a statement is necessary to adequately inform private parties of their rights and legitimate expectations when electing to enter into an ADR proceeding with a Federal Agency.

In addition, the ADR Council should recognize in its revised Guidance that this is a developing area of law and practice affecting many governmental and private interests, and acknowledge the need to continue to examine these complex, potentially controversial, issues in collaboration with all affected interests.

In this regard the ADR Council may wish to reference the ongoing work on federal confidentiality policy of the ABA's broad-based Ad Hoc Committee on Confidentiality formed in the spring of 2000, and avoid issuing a final rule on confidentiality in a manner which would ignore or reduce the potential value and contribution of this effort to this legal and policy area.

Respectfully submitted,

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